

SENATE RECORD VOTE ANALYSIS

105th Congress
2nd Session

Vote No. 218

July 22, 1998, 9:40 a.m.
Page S-8690 Temp. Record

COMMERCE-JUSTICE-STATE/Lawyers for Grand Jury Witnesses

SUBJECT: Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Bill for fiscal year 1999 . . . S. 2260. Bumpers modified amendment No. 3243.

ACTION: AMENDMENT REJECTED, 41-59

SYNOPSIS: As reported, S. 2260, the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Bill for fiscal year 1999, will provide a total of \$33.239 billion in new budget authority, which is \$1.115 billion more than appropriated for fiscal year (FY) 1998 and is \$3.647 billion less than requested. The bill contains large spending increases for various law enforcement activities.

The Bumpers modified amendment would amend the Federal Rules of Criminal Procedure to provide that each witness subpoenaed to appear and testify before a grand jury in a district court, or to produce papers or other objects before that grand jury, would be allowed to have a lawyer present during questioning by the grand jury. The lawyer would be allowed to be present only during the questioning of the witness and only to advise the witness. The lawyer would not be permitted to address the attorney for the Government or any grand juror, or otherwise participate in the proceedings before the grand jury. A lawyer could not represent more than one client in a grand jury proceeding if the independent judgment of the lawyer for one client would likely adversely affect the independent judgment of the lawyer for another client.

Those favoring the amendment contended:

Under the current grand jury system, if someone is subpoenaed to go before a grand jury as a witness, he or she must go, and he or she must go alone. Some witnesses may have to appear for only a couple of hours; some may have to testify for a week or more. They sit before panels of citizens as prosecutors grill them with questions. They may or may not have the slightest idea of why they have been subpoenaed, and they often have little idea if their answers may inadvertently implicate them in some type of

(See other side)

YEAS (41)			NAYS (59)			NOT VOTING (0)	
Republicans (3 or 5%)	Democrats (38 or 84%)		Republicans (52 or 95%)	Democrats (7 or 16%)		Republicans (0)	Democrats (0)
Hutchison	Akaka	Inouye	Abraham	Hatch	Biden	EXPLANATION OF ABSENCE: 1—Official Business 2—Necessarily Absent 3—Illness 4—Other SYMBOLS: AY—Announced Yea AN—Announced Nay PY—Paired Yea PN—Paired Nay	
Mack	Baucus	Johnson	Allard	Helms	Byrd		
Specter	Bingaman	Kennedy	Ashcroft	Hutchinson	Feinstein		
	Boxer	Kerrey	Bennett	Inhofe	Kohl		
	Breaux	Kerry	Bond	Jeffords	Lieberman		
	Bryan	Landrieu	Brownback	Kempthorne	Moynihan		
	Bumpers	Lautenberg	Burns	Kyl	Reid		
	Cleland	Leahy	Campbell	Lott			
	Conrad	Levin	Chafee	Lugar			
	Daschle	Mikulski	Coats	McCain			
	Dodd	Moseley-Braun	Cochran	McConnell			
	Dorgan	Murray	Collins	Murkowski			
	Durbin	Reed	Coverdell	Nickles			
	Feingold	Robb	Craig	Roberts			
	Ford	Rockefeller	D'Amato	Roth			
	Glenn	Sarbanes	DeWine	Santorum			
	Graham	Torricelli	Domenici	Sessions			
	Harkin	Wellstone	Enzi	Shelby			
	Hollings	Wyden	Faircloth	Smith, Bob			
			Frist	Smith, Gordon			
			Gorton	Snowe			
			Gramm	Stevens			
			Grams	Thomas			
			Grassley	Thompson			
			Gregg	Thurmond			
			Hagel	Warner			

crime. If they are asked something and do not remember, or remember something incorrectly, they may end up being charged with perjury. In some States, this problem has been addressed by allowing witnesses to bring their attorneys with them into grand jury proceedings. Other States have done away with the problem by eliminating grand juries altogether. The only concession the Federal Government has made, though, has been to let a witness' attorney sit outside the proceedings, and to let the witness get up and go ask the attorney's advice after any question. We think that getting up to leave the room over and over to talk to one's attorney makes one look guilty to the grand jurors. A witness would look much less guilty if his or her lawyer were in the room. We have therefore offered the Bumpers amendment, which would allow witnesses to have counsel present in grand jury proceedings. Those lawyers would not be allowed to participate beyond giving advice to their clients on how to respond to questions, so the delays that would come from this amendment would be minimal. This amendment offers a quick, common-sense solution to the current abusive process. We urge our colleagues to accept it.

Those opposing the amendment contended:

Many of us have served as Federal prosecutors, and thus have a very keen appreciation for the purpose of the grand jury system, which is required by the Constitution. Under that system, an agent of the Federal Government is limited in his or her ability to charge someone with a serious crime. A Federal prosecuting attorney must instead convince a grand jury, comprised of citizens, that enough evidence exists to bring charges. The testimony is taken in secret for four reasons. First, if the evidence is not sufficient the public may never even know that the individual was under investigation, and his reputation thus will not be stained. Second, secrecy prevents those who are being investigated from interfering with witnesses and otherwise tampering with the investigation. Third, secrecy encourages witnesses to speak more freely. Fourth, it decreases the likelihood that one who is about to be indicted by a grand jury will flee and thereby avoid being brought to trial. Grand juries will not always indict, and, at times, prosecutors will decide during proceedings that there is not enough evidence to bring charges and they will not ask for an indictment. Once a person is charged, then that person has a right to present his or her defense fully before a jury of 12 citizens, with a lawyer who will argue, debate, object, and do everything possible to defend him or her.

As a practical matter, we note that agreeing to the Bumpers amendment would make it almost impossible to bring charges against organized crime figures. Under current practices, when a grand jury convenes and starts bringing in several or even dozens of organized crime figures as witnesses, most of those witnesses are noncooperative, but the Government usually has one or more witnesses who are part of the organized crime ring who are secretly helping. In such proceedings, each witness typically gets up and leaves the room after each question to consult with his or her lawyer. However, if lawyers were in the rooms with them, the lawyers picked would be picked by the organized crime ring. If a witness dared pick his own lawyer, he would immediately be